

IN THE HIGH COURT OF JUDICATURE AT MADRAS
Dated : 11.12.2018

CORAM
THE HON'BLE MR. JUSTICE M.V.MURALIDARAN

C.M.A. No.1956 of 2018
and
CMP.No.15182 of 2018

A.Abdul Gani

... Appellant

vs

1.P.Balasubramaniam
2.R.Meerabai
3.Mohammed Rafi
4.Sukila Banu
5.Sheik Mohideen
6.Fasaludin
7.Najemudeen
8.T.N.Palanisamy
9.R.Kulandasamy
10.K.Kasthuri
11.N.Jayalakshmi

... Respondents

Civil Miscellaneous Appeal filed under Order 43, Rule 1 of the Code of Civil Procedure, 1909 against the order dated 17.4.2018 passed in I.A.No.109 of 2018 in O.S.No.48 of 2018 on the file of the II Additional District Judge, Erode.

For Appellant : Mr.I.C.Vasudevan

For Respondents : Mr.K.S.Jeyaganeshan
: for respondent Nos.1 & 2

JUDGMENT

The Civil Miscellaneous Appeal has been filed by the appellant against the order dated 17.4.2018 passed in I.A.No.109 of 2018 in O.S.No.48 of 2018 on the file of the II Additional District Judge, Erode.

2. For the sake of convenience, the parties are referred to as per their array in the suit.

3. The respondents 1 and 2 are the plaintiffs and the appellant is defendant No.1; respondent Nos.3 to 7 are defendants 2 to 6 and respondent Nos.8 to 11 are the defendants 8 to 11 in the suit. The plaintiffs have filed the suit

being O.S.No.48 of 2018 seeking the following reliefs:

- (i) Setting aside the judgment and decree dated 30.11.2014 in O.S.no.487 of 2013 passed by the Hon'ble First Additional Subordinate Judge, Erode.
- (ii) Declaring that the first plaintiff is the absolute owner of the first item of suit property.
- (iii) Restraining the defendants, their men and agents from disturbing the first plaintiff's peaceful possession and enjoyment of the first item of suit property or encroaching upon the same by way of a consequential injunction.
- (iv) Declaring that the 2nd plaintiff is the absolute owner of the 2nd item of the suit property.
- (v) Restraining the defendants their men and agents from disturbing the 2nd plaintiff's peaceful possession and enjoyment of the item No.2 of the suit property by way of consequential permanent injunction.

4. Along with the suit, the plaintiffs have filed I.A.No.109 of 2018 under Order 39, Rule 1 and 2 of C.P.C. seeking to grant an order of temporary injunction restraining the defendants 1 to 6, their men, agents and assignees from disturbing their peaceful possession and enjoyment or encroaching upon items 1 and 2 of the suit properties forcibly till the disposal of the suit.

5. Denying the averments made in the affidavit filed in support of the petition, the second defendant filed the counter, which was adopted by defendants 3 to 6.

6. Before the Court below, on the side of the plaintiffs 18 documents were marked and no document was marked on the side of the defendants. The advocate commissioner's report and plan were marked as Exs.C1 and C2.

7. Holding that the plaintiffs have proved their possession of the suit properties on the date of filing of the suit, by the impugned order, the Court below restrained the defendants 1 to 6 from in any manner disturbing the possession of the plaintiffs of the suit properties as well as creating any alienation or encumbrance over the suit properties till the disposal of the suit except by due process of law. Assailing the order of the Court below, the appellant who is the first defendant in the suit has filed the present Civil Miscellaneous Appeal.

8. Challenging the impugned order, the learned counsel for the first defendant submitted that the Court below was not correct in holding that the plaintiffs are in possession and enjoyment of the suit property without adducing any evidence and based on assumptions, it had granted temporary injunction and the same is liable to be dismissed. He would submit that the Court below failed to look into the decree obtained by the first defendant in O.S.No.487 of 2013 dated 30.10.2014 in a proper perspective. According to the learned counsel, the Court below was not correct in holding that the gift deed Ex,P12 is doubtful without any basis and at any rate, the other reasoning given by the Court below in granting temporary injunction are against the law and hence, prayed for setting aside the same.

9. Per contra, reiterating the findings of the Court below, the learned counsel for the plaintiffs submitted that the plaintiffs are in possession and enjoyment of the suit properties and having found that the plaintiffs have established their prima facie case, the Court below rightly granted temporary injunction. Since the said finding of the Court below is based on the documentary evidence, there is no need to interfere with the same.

10. I have heard Mr.I.C.Vasudevan, learned counsel for the appellant and Mr.K.S.Jeyaganeshan, learned counsel for the respondents 1 and 2 and also perused the materials available on record.

11. It appears that the plaintiffs are claiming title and possession of the suit properties through registered sale deeds dated 16.9.1994. The title is traced to one Mohammed Jaffer, who purchased it on 22.8.1964 and he died intestate on 12.02.1980. After the demise, his wife Ajeemabibi and sons and daughters have succeeded the suit properties and other estates of Mohammed Jaffer Sahib. On 11.5.1992, a release deed came to be executed by the sons and daughters of Mohammed Jaffer Sahib relinquishing their right, title and interest in favour of the mother of Mohammed Jaffer Sahib, who had appointed one D.Ramakrishnan as her power agent on 31.5.1993, who sold the suit properties to the plaintiffs.

12. On the other hand, the defendants claimed that the suit properties and other adjacent properties belonged to Mohammed Jaffer Sahib and on 05.01.1977, Mohammed Jaffer Sahib conveyed the suit properties and other properties to the second defendant by way of a gift deed/Hiba and having accepted the gift/Hiba and took possession of the gifted properties, he was paying kist. According to the defendants, the second defendant did not release his right in favour of Ajeemabibi, who had no right to appoint D.Ramakrishnan as her power agent. The sale deeds dated 16.9.1994 relied upon by the plaintiffs do not affect the right

of the second defendant or the suit properties. Therefore, the plaintiffs have no right, title or interest over the suit properties.

13. Though the defendants claimed title under an unregistered gift/Hiba deed dated 05.01.1977 said to have been executed by Mohammed Jaffer Sahib in favour of the second defendant, the defendants have failed to produce the same and on the other hand, the plaintiffs have marked the copy of the gift deed as Ex.P12 before the Court below.

14. The Court below held that a perusal of Ex.P12 will/Hiba would go to show that all the estate of Mohammed Jaffer Sahib have been given to the second defendant and the established law is that a Muslim cannot execute a gift or will in violation of Muslim Law. As rightly held by the Court below whether a Muslim in his death bed, can gift his whole properties to a particular person of his choice is a question to be looked into and the same cannot be decided without trial.

15. The second defendant asserts right to the suit properties by contending that earlier he had filed O.S.No.487 of 2013 on the file of the Sub-Court, Erode. But in the said suit, he has not chosen to assert the genuineness and/or validity of Ex.P12 and has chosen to remain ex parte in the said suit. Therefore, it is clear that the second defendant has washed his hands and has left the first defendant in a lurch.

16. As rightly held by the Court below the claim of title by the first defendant through defendants 2 to 6 appear to be surrounded by suspicion and on the other hand, the claim of title of the plaintiffs is based on registered sale deeds and other related documents, which are prima facie reflect passing of title in favour of the plaintiffs.

17. The Court below, upon appreciating the documentary evidence produced by the plaintiffs, held as under:

"21. From the above discussion, it can be seen that the petitioners have demonstrated positive passing of title and positive possession of the suit property and the respondents have failed to prove either title or possession of the suit property. The presence of one or two respondents in the suit property at the time of inspection by the Commissioner cannot be taken to be a proof of their possession.

22. From the above discussions, it is clear that the petitioners are in positive possession and constructive possession of suit property beyond doubt and the respondents do not have any lawful title or possession beyond doubts. As such the

petitioners have shown sufficient cause to protect their possession."

18. It is well settled that for grant of temporary injunction the factors to be satisfied are prima facie case, balance of convenience and irreparable loss.

19. Prima facie case does not mean that the plaintiff should have a cent percent case which will in all probability succeed in trial. Prima facie case means that the contentions which the plaintiff is raising, require consideration in merit and are not liable to be rejected summarily.

20. To see balance of convenience, it is necessary to compare case of parties, comparative mischief or inconvenience which is likely to sue from withholding the injunction will be grater than which is likely to arrive from granting it.

21. There are many injuries incapable of being repaired but a Court of equity does not regard them as 'irreparable'. Ordinarily injury is irreparable when without fair and reasonable address of Court, it would be denial of justice. Very often an injury is irreparable where it is continuous and repeated or where it is remediable at law only by a multiplicity of suits. Sometime the term irreparable damage refers to the difficulty of measuring the amount of damages inflicted. However, a mere difficulty in proving injury does not establish irreparable injury.

22. A temporary injunction can be granted only if the person seeking injunction has a concluded right, capable of being enforced by way of injunction. Temporary injunction is an equitable remedy as well as it is governed by law. Therefore, equitable principles are of very much importance in granting or rejecting injunction. Equitable principle is that, he who seeks equity must come with clean hands. The Hon'ble Apex Court as well as this Court, time and again held that, one must come with clean hands to claim the discretionary relief of temporary injunction. In the present case, prima facie, the defendants have failed to prove that the plaintiffs have approached the Court with unclean hands.

23. Admittedly, the defendants have not produced any piece of paper to establish their case. As stated supra, the plaintiffs have marked 18 documents, from which, it is seen that they have established their case that on the date of filing of the suit, they were in possession and enjoyment of the suit properties. Therefore, this Court is of the considered view that upon analysing the documentary evidence produced before it, the trial Court had granted temporary injunction and the same warrants no interference. No valid grounds have been made out

by the first defendant to interfere with the findings of the Court below. Hence, the present appeal is liable to be dismissed.

24. In the result, the Civil Miscellaneous Appeal is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

It is made clear that the views expressed by this Court in this judgment are only prima facie views. It is open to the trial Court to dispose of the suit on merits and in accordance with law uninfluenced by the order of this Court as expeditiously as possible, preferably within a period of six months. The plaintiffs and the defendant are directed to co-operate the Court below for early disposal of the suit.

Sd/-

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

vs

To

The II Additional District Judge,
Erode.

+1cc to Mr.I.C.Vasudevan, Advocate, S.R.No.85328

+1cc to Mr.K.S.Jeyaganeshan, Advocate, S.R.No.85264

C.M.A. No.1956 of 2018
and

CMP.No.15182 of 2018

KAN(CO)

rrs 21/03/2019

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